Supreme Court, U.S.
FILED
APR 6 1998
CLERK

(1)

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050

CANDANCE M. SABELLA
Counsel of Record
Assistant Attorney General
Florida Bar I.D. No. 0445071
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

ATTORNEY FOR RESPONDENT

(Capital Case)

QUESTIONS PRESENTED FOR REVIEW

Respondent objects to the petitioner's statement of the questions presented as being predicated upon incorrect factual conclusions and consequently restates the questions as follows:

1. Whether this Court should exercise its discretion to review a state court's denial of a successive collateral appeal based on the application of a state procedural bar where the same grounds, Hitchcock error and the alleged significant non-record mitigating facts, were previously considered and rejected by the Florida Supreme Court's denial of a State Petition for Writ of Habeas Corpus and by this Court's denial of Alvord's Petition for Writ of Certiorari?

2. Whether the decision of the Florida Supreme Court was arbitrary and capricious in failing to order an evidentiary hearing to consider proffered non-record mitigating evidence presented by petitioner where petitioner did not satisfy state procedural rules, after having granted such relief to other death sentenced defendants who were able to satisfy the state procedural rules?

3. Whether a Hitchcock error and the existence of additional non-record mitigating facts is compounded by the sentencing court and jury having considered aggravating circumstances under constitutionally invalid instructions is appropriately before this Court where the jury instruction challenge was neither raised at trial nor presented to the Florida Supreme Court on direct appeal or during any other review before that court?

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED FOR REVIEW I

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

OPINION BELOW 1

JURISDICTION OF THE SUPREME COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE AND FACTS 7

a) Procedural History 7

b) Facts 10

REASONS FOR DENYING THE WRIT 12

A. Introduction 12

B. Preclusion of Mitigating Evidence 13

C. Arbitrary and Capricious Claim 25

D. Denial of the Writ 35

CONCLUSION 38

TABLE OF CITATIONS

PAGE NO.

Agan v. State,
503 So. 2d 1254 (Fla. 1987) 27

Alvord v. Dugger,
494 U.S. 1090 (1990) 9, 14, 17

Alvord v. Dugger,
541 So. 2d 598 (Fla. 1989) 8, 15, 17

Alvord v. State of Florida,
694 So. 2d 704 (Fla. 1997) 1, 10, 13, 17, 18, 20, 22, 24

Alvord v. State,
322 So. 2d 533 (Fla. 1975), cert. denied,
428 U.S. 923 (1976) 7, 10-12, 23

Alvord v. State,
396 So. 2d 184 (Fla. 1981) 7

Alvord v. State,
459 So. 2d 316 (Fla. 1984) 8

Alvord v. Wainwright,
725 F.2d 1282 (11th Cir.), cert. denied,
469 U.S. 956 (1984) 8

Arave v. Creech,
507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) ... 30

Beltran-Lopez v. State,
626 So. 2d 163 (Fla.1993) 36

Buchanan v. Angelone,
___ U.S. ___, 118 S.Ct. 757,
___ L.Ed.2d ___ (1997) 30, 34

California v. Ramos,
463 U.S. 992, 103 S.Ct.
3446, 77 L.Ed.2d 1171 (1983) 34

Clark v. Dugger,
559 So. 2d 192 (Fla. 1990) 26, 27

Coleman v. Thompson,
501 U.S. 722 (1991) 2, 18, 22

Durley v. Mayo,
351 U.S. 277 (1956) 35

Espinosa v. Florida,
112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992) 9

Espinosa v. Florida,
505 U.S. 1079 (1992) 36

Foxfilm Corp. v. Muller,
296 U.S. 207 (1935) 13

Francis v. Barton,
581 So.2d 583 (Fla.) cert. denied, 111 S.Ct. 2879 (1991) .. 19

Hall v. Dugger,
531 So. 2d 76 (Fla. 1988) 25

Hall v. State,
541 So. 2d 1125 (Fla. 1989) 25-27

Harris v. Reed,
489 U.S. 255 (1989) 13

Henderson v. Dugger,
617 So. 2d 313 (Fla.), cert. denied, 507 U.S.
1047, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993) 36

Herb v. Pitcairn,
324 U.S. 117 (1945) 2, 13, 22

Hitchcock v. Dugger,
481 U.S. 393 (1987) ... 8, 9, 12, 14, 15, 17, 19, 25-27, 34, 36

Martin v. Walton,
368 U.S. 25 (1961) 35

Medina v. State,
690 So.2d 1241 (Fla 1997) 19

Meeks v. Dugger,
576 So. 2d 713 (Fla. 1991) 19, 25, 28, 29

Mental Hygiene Department v. Kirchner,
380 U.S. 194 (1965) 35

Michigan v. Long,
463 U.S. 1032 (1983) 13

O'Callaghan v. State,
461 So. 2d 1354 (Fla. 1984) 27

Rice v. Sioux City Cemetery,
349 U.S. 70 (1955) 36

Sanks v. Georgia,
401 U.S. 144 (1970) 35

Sochor v. Florida,
504 U.S. 527, 112 S.CT. 2114,
119 L.Ed.2d 326 (1992) 13, 36

Texas v. Mead,
465 U.S. 1041 (1984) 35

United States v. Johnston,
268 U.S. 220 (1925) 35

Wainwright v. Sykes,
433 U.S. 72 (1977) 18

Wilner v. Character Committee,
373 U.S. 96 (1963) 35

Ylst v. Nunnemaker,
501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) ... 18

CONSTITUTION

U.S. Const. Amend. VIII 3

U.S. Const. Amend. XIV 3, 25

STATUTES

Title 28, United States Code, Section 1257(a) 2

§922.071, Florida Statutes (1983) 8

RULES

Florida Rule of Criminal Procedure 3.850 ... 3, 12, 18, 19, 26

Rule 10.1(c) of the Rules of the
Supreme Court of the United States 2

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed is reported at Alvord v. State of Florida, 694 So. 2d 704 (Fla. 1997), and is reproduced in the appendix to this response (A 1 - A 13). References to the appendix are designated by the letters A through E followed by a page number.

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion in this case on April 10, 1997 (A 1 - A 13). Petitioner filed a Motion for Rehearing, which was denied on May 28, 1997. (B 1) Although Petitioner asserted below and asserts here a deprivation of his rights guaranteed by the Constitution of the United States, the questions he raises would not affect the judgment below and therefore this Court does not have jurisdiction. Coleman v. Thompson, 501 U.S. 722, 729 (1991); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). The instant petition merely challenges the state court's application of state procedural bars. Even if jurisdiction is deemed to exist under Title 28, United States Code, Section 1257(a) and Rule 10.1(c) of the Rules of the Supreme Court of the United States, this Court should decline to exercise its jurisdiction for the reasons that follow.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. Nor shall any State deprive any person of life, limb or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rules of Court

RULE 3.850. MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is

otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

(c) Contents of Motion. The motion shall be under oath and include:

(1) the judgment or sentence under attack and the court which rendered the same;

(2) whether there was an appeal from the judgment or sentence and the disposition thereof;

(3) whether a previous postconviction motion has been filed, and if so, how many;

(4) if a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;

(5) the nature of the relief sought; and

(6) a brief statement of the facts (and other conditions) relied on in support of the motion.

This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

(d) Procedure; Evidentiary Hearing; Disposition. On filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. If the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available state remedies including any other postconviction motion under this rule. The answer shall also state whether an evidentiary hearing was accorded the movant. If the motion has not been denied at a previous stage in the proceedings, the judge, after the answer is filed, shall determine whether an evidentiary hearing is required. If an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and make findings of fact and conclusions

of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge or resentence the prisoner, grant a new trial, or correct the sentence as may appear appropriate.

(e) Prisoner's Presence Not Required. A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(f) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(g) Appeal; Rehearing; Service on Prisoner. An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for postconviction relief shall include a statement that the movant has the right to appeal within 30 days of the rendition of the order. The prisoner may file a motion for rehearing of any order denying a motion under this rule within 15 days of the date of service of the order. The clerk of the court shall promptly serve on the prisoner a copy of any order denying

> a motion for postconviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.
>
> (h) Habeas Corpus. An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention.

STATEMENT OF THE CASE AND FACTS

a) Procedural History

On April 9, 1974, a jury convicted Gary Eldon Alvord of three counts of first degree murder. The jury recommended the death penalty, and the trial court imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Alvord's first motion for postconviction relief was filed on October 6, 1978. The motion was denied by the trial court and affirmed by the Florida Supreme Court on appeal. Alvord v. State, 396 So. 2d 184 (Fla. 1981).

Alvord then sought relief in federal court by way of

Petition for Writ of Habeas Corpus. Relief was ultimately denied by the Eleventh Circuit in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984). On November 20, 1984, Alvord petitioned the Florida Supreme Court for a Writ of Extraordinary Relief and requested a judicial determination of his competency to be executed separate from the existing procedure under §922.071, Florida Statutes (1983). That petition was denied in Alvord v. State, 459 So. 2d 316 (Fla. 1984).

Subsequent to this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Alvord filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking (1) a stay of a mental examination directed by the Governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase. Alvord then filed an amended habeas corpus petition adding a challenge to the admission of Alvord's confession. The Petition for Writ of Habeas Corpus was denied. Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989)(D 1 - D 15). The Florida

Supreme Court specifically found the Hitchcock error to be harmless. A motion for rehearing was denied on May 11, 1989. Alvord then sought certiorari review of the Hitchcock error in this Court. The Petition for Writ of Certiorari was denied on April 16, 1990. Alvord v. Dugger, 494 U.S. 1090 (1990).

Alvord filed His Second Motion for Post Conviction Relief on June 30, 1989 once again asserting the Hitchcock error. On March 9, 1992, the State filed a response to the motion, wherein the State urged that Alvord's Hitchcock claim was procedurally barred. The trial court granted Alvord's request for the opportunity to present evidence in support of his Hitchcock claim on November 6, 1992. After requesting numerous continuances, Alvord then filed his Second Amendment to Second Motion for Post-Conviction Relief, adding a claim under Espinosa v. Florida, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992). Alvord then filed another request to continue his evidentiary hearing. The State filed a second response on September 24, 1993, asserting a procedural bar as to the Espinosa claim. Alvord then filed another request to continue his evidentiary hearing. On June 24, 1994, a year and a half after the trial court

granted the request for an evidentiary hearing, the State filed a Motion For Rehearing on Issue of Defendant's Entitlement to Evidentiary Hearing. After hearing oral argument on the issue, the circuit court granted the State's motion and denied the Motion for Post-conviction Relief based on the procedural bars. (C 1 - C 2) On appeal from the denial of his second state motion for post conviction relief, the Florida Supreme Court affirmed the trial court's denial based on the fact that this claim had already been raised and rejected and Alvord had failed to present any newly discovered evidence to excuse the procedural bar. Alvord v. State of Florida, 694 So. 2d 704 (Fla. 1997).

b) Facts

The facts of the instant case were set forth as follows by the Florida Supreme Court in Alvord v. State, 322 So. 2d 533 (Fla. 1975).

> "In the early afternoon of June 18, 1973, the bodies of Georgia, Ann and Lynn were discovered in a home in Tampa, Florida. The home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother.
>
> Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. A vaginal test on

> Lynn showed the presence of semen and there was a slight abrasion on the right side of her head. The front door of the house had been kicked open and the condition of the house tended to indicate the murderer burglarized the house either before or after the three women had been murdered. The time of death was tentatively established as occurring between 1:00 a.m., Saturday, June 16, 1973, and 1:30 p.m., Monday, June 18, 1973."

Id. at 533.

Additionally, the Florida Supreme Court noted that there was evidence that the eighteen year old victim Lynn had been raped prior to the murder. Her underwear were found in a room separate from her body, her pubic area was exposed and Alvord had fingernail scratches on his chest. Id. at 538. The Court also noted that the verdict of guilt was supported by evidence that: 1) Alvord had possession of some of Ann's jewelry after the murder; 2) the police found a short piece of rope in a dresser drawer in the defendant's apartment which was the same type of rope used to strangle all three of the victims; 3) one of defendant's shirts had blood on it; 4) on the morning after the murder that the defendant had over a hundred dollars; 5) one of the victim's purses used to store large quantities of money was found empty; and, 6) Alvord confessed to his girlfriend Zelma

Hurley. Zelma Hurley testified that the defendant told her, "I had to rub out three people last night." He identified the victims as Ann, Lynn and Georgia. The defendant then told Zelma the details of the murder. Id. at 539 - 540.

REASONS FOR DENYING THE WRIT

A. Introduction

Petitioner, Alvord has presented three questions for this Court's review. Each of these questions hinge on the state court's resolution of the Hitchcock v. Dugger, 481 U.S. 393 (1987) error. It is respondent's position that these claims do not present a federal question, because denial of all relief by the state courts was based on state procedural rules, rather, than any underlying federal question. The Florida Supreme Court rejected petitioner's claim based on state procedural law which requires the denial of a successive motion where the prior determination was on the merits and the motion fails to allege new or different grounds for relief. Fla. R. Crim Pro. 3.850 (f). The court also reiterated that the Hitchcock error was harmless because much

of the evidence in mitigation outlined in the habeas corpus petition had been presented originally to the judge and jury through the testimony of Dr. Robey who explained much of Alvord's family and mental history. Alvord v. State, 694 So.2d 704 n.1 (Fla 1997)

In Sochor v. Florida, 504 U.S. 527, 112 S.CT. 2114, 119 L.Ed.2d 326 (1992), this Honorable Court reiterated the well established principle of federalism that a state decision resting on an adequate substantive law is immune from review and extended that rule to independent and adequate state procedural grounds. As the opinion below rests on an adequate and independent state ground, this Court lacks jurisdiction to review the instant petition. See Harris v. Reed, 489 U.S. 255, 264, n. 10 (1989); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Herb v. Pitcairn, 324 U.S. 117, 125 - 126 (1945); Foxfilm Corp. v. Muller, 296 U.S. 207, 210 (1935). Accordingly, the petition should be denied.

B. Preclusion of Mitigating Evidence

Petitioner initially asserts that his constitutional rights were violated when the State of Florida, without conducting an

evidentiary hearing, denied his request for a new sentencing proceeding based on Hitchcock error, despite his allegation that significant nonrecord material had never been considered. The real question before this Court, however, is whether this Court should exercise its jurisdiction to review a claim where: 1) the state appellate court's denial in 1997 was based on adequate and independent state grounds, 2) Alvord had previously asserted in 1987 that no state evidentiary hearing was necessary, and 3) the state appellate court had already reviewed the proffered evidence in 1987 and found it to be harmless. Respondent asserts that under the circumstances this Court should decline certiorari review.[1]

Subsequent to this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Alvord filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking (1) a stay of a mental examination directed by the Governor to determine his competency to be executed and (2) *a new sentencing proceeding because neither the trial judge nor the jury*

---

[1] Alvord's Petition for Writ of Certiorari raising substantially the same claim was subsequently denied by this Court. Alvord v. Dugger, 494 U.S. 1090 (1990)

considered nonstatutory mitigating circumstances during the sentencing phase. Alvord then filed an amended habeas corpus petition adding a challenge to the admission of Alvord's confession. The Petition for Writ of Habeas Corpus was denied. Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989). With regard to the Hitchcock claim the Florida Supreme Court held:

> In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants--the prosecutor, the defense counsel, and the trial judge--explained to the jury that it should limit consideration of mitigating circumstances to those enumerated in the statutes.
>
> We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, --- U.S. ----, 108 S.Ct. 2834, 100 L.Ed.2d 935 (1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 531 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Fla.1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert.

filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikenas v. Dugger, 519 So.2d 601 (Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, --- U.S. ----, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence

> clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Id. at 598-99

Alvord sought certiorari review of the Hitchcock claim in this Court. The Petition for Writ of Certiorari was denied on April 16, 1990. Alvord v. Dugger, 494 U.S. 1090 (1990). (E1)

Alvord then went back to state court and filed his Second Motion for Post Conviction Relief on June 30, 1989, once again asserting the Hitchcock error and for the first time requesting an evidentiary hearing on the claim. The successive motion was denied as procedurally barred. The Florida Supreme Court affirmed the finding of a procedural bar noting that "*the nonrecord, nonstatutory evidence Alvord has outlined in the motion at issue is very similar to that which [the court] considered in his previously rejected habeas corpus petition.*" Alvord v. State of Florida, 694 So. 2d 704, 705 (Fla. 1997).

In the instant case, the Florida Supreme Court noted that the trial court had rejected petitioner's claim based on the state procedural bar. State procedural law requires the denial of a successive motion that raises claims previously rejected on the

merits absent a showing of new or different grounds for relief. See, Florida Rule of Criminal Procedure 3.850 (f). After reviewing the proffered evidence the Florida Supreme Court determined that because, "the evidence outlined in Alvord's *rule 3.850* motion is not substantially different from that which we considered and rejected as warranting a new penalty proceeding in Alvord VI, we find that the trial court properly denied his motion." Id. 694 So.2d at 707. Under these circumstances, respondent maintains that Petitioner's claim does not present a federal question, but rather seeks review of a claim that was denied as procedurally barred. Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (state court decision based on procedural bar creates rebuttable presumption that later opinions without reason are based on procedural bar). Accord, Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Accordingly, review should be denied. Wainwright v. Sykes, 433 U.S. 72 (1977).

Furthermore, it is also important to note that despite Alvord's contention that harmless error could not be determined absent an evidentiary hearing, he had previously asserted that

such a hearing was not necessary to resolve the issue. In his state court habeas petition, Alvord asserted, " . . . The same is true for the Hitchcock issue presented here, for it is a 'record issue' (i.e. needs no further evidentiary development) and can be decided as a matter of law." Petition for Extraordinary Relief, For Writ of Habeas Corpus; and Request For Stay of Mental Examination, pg.2, ¶4. Clearly, if counsel had felt that an evidentiary hearing was warranted he should have requested such relief from the court as the Florida Supreme Court has not hesitated to remand for an evidentiary hearing where the need for same was asserted at the outset. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). Having failed to obtain his goal of a new sentencing proceeding, it is evident that Alvord's return to state court to request an evidentiary hearing is merely an attempt to circumvent Florida law and get a "second bite at the apple." Rule 3.850, Florida Rules of Criminal Procedure. See, also, Medina v. State, 690 So.2d 1241 (Fla 1997); Francis v. Barton, 581 So.2d 583 (Fla.) cert. denied, 111 S.Ct. 2879 (1991).

Despite petitioner's continued insistence that an evidentiary hearing was required, the Florida Supreme Court's

holding accepted "*the asserted evidence in mitigation as true in reaching this decision,*" Alvord v. State, 694 So. 2d at 707. Nevertheless, after a review of the asserted facts, the court held that the prior harmless error finding was not altered by the facts as presented by Alvord in his successive motion:

> In the habeas corpus petition we addressed in Alvord VI, Alvord contended that he was denied the opportunity to present nonstatutory mitigating evidence concerning, among other things, his capacity for rehabilitation; the history of mental illness within his family; his traumatic life experiences while involuntarily committed to mental institutions; and the fact he was a patient in mental institutions for twelve of the fourteen years preceding the murders in issue while undergoing treatment as a paranoid schizophrenic. In finding the Hitchcock error to be harmless, we first reiterated the statutory aggravating and mitigating circumstances that were properly considered at the penalty phase proceeding and found to exist by the trial judge. Specifically, the trial judge found three aggravating circumstances (committed during the course of a felony, each of the murders was heinous, atrocious, or cruel, and great risk of bodily harm to more than one person), and two mitigating circumstances (at the time of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired). We also noted that much of the evidence in mitigation outlined in the habeas corpus petition had been presented to the judge and jury. Finally, we concluded that the additional evidence in mitigation set forth in the

petition was "clearly insufficient to change the sentencing decision, given the circumstances in this case." Alvord VI, 541 So.2d at 600.

In his latest petition, Alvord argues that the judge and jury should have been allowed to consider that he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent. This asserted evidence in mitigation is comparable to that which we considered in Alvord VI. Further, much of this evidence is similar to that presented during the penalty phase proceeding or was specifically not presented at trial based on Alvord's refusal to be examined by court-appointed psychiatrists. Given that we previously found the Hitchcock error to be harmless based on very similar evidence, we must again reject Alvord's request for a new penalty phase proceeding. Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion. This is especially true given that much of the evidence in mitigation goes to Alvord's mental condition, which was specifically found to be a factor in mitigation.

* * *

In conclusion, because we find that the evidence outlined in Alvord's rule 3.850 motion is not substantially different from that which we considered and rejected as warranting a new

> penalty proceeding in Alvord VI, we find that the trial court properly denied his motion.
>
> Alvord v. State, 694 So.2d 705-707

Thus, an evidentiary hearing, where Alvord may or may not be able to establish the proffered evidence as true, would not result in any established evidence being before the court that has not already been accepted as true by the court. Accordingly, this Court should not only decline to exercise certiorari jurisdiction because the relief was denied on state procedural rules, but, also because on these facts the outcome would remain the same. Coleman v. Thompson, 501 U.S. at 729; Herb v. Pitcairn, 324 U.S. at 125-126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Even should this Court find it appropriate to accept jurisdiction to review the facts of a specific case, it is respondent's position that the Florida Supreme Court correctly held that the failure to present the proffered mitigating evidence was harmless beyond a reasonable doubt. The facts introduced at trial show that Alvord was convicted of the 1973 murders of

Georgia, Ann and Lynn. The three women were found murdered in their beds. The home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother. The front door of the house had been kicked open and the condition of the house tended to indicate the murderer burglarized the house either before or after the three women had been murdered. Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. Additionally, there was evidence that the eighteen year old victim Lynn had been raped prior to the murder. Her underwear were found in a room separate from her body, her pubic area was exposed, there was semen present, and Alvord had fingernail scratches on his chest. Alvord told his girlfriend Zelma Hurley, "I had to rub out three people last night." He identified the victims as Ann, Lynn and Georgia. The defendant then told Zelma the details of the murder. Alvord v. State, 322 So. 2d at 538.

In imposing the death sentence, the trial court found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary;

(2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances: (1) Alvord was under the influence of extreme mental or emotional disturbance, and (2) his capacity to conform his conduct to the requirements of law was impaired. [2]

The mitigating evidence now being urged as "new" was clearly insufficient to change the sentencing decision, in light of the foregoing facts and because the essence of all of this mitigating evidence was presented in support of the statutory mitigating circumstances. Alvord is simply applying a different label to that which was already presented to and found by the judge and jury. Accordingly, given the fact that Alvord's mental and family history were considered by both the judge and jury as

---

[2] The Florida Supreme Court noted that during the penalty phase proceeding Dr. Robey was called to testify on behalf of the State. Nevertheless, he testified to factors in both aggravation and mitigation. As to statutory mitigation, Dr. Robey testified that Alvord was under extreme stress at the time he committed the murders and that his capacity to conform his conduct to the requirements of the law was impaired. On cross-examination by defense counsel, Dr. Robey was also allowed to testify that Alvord was confined to a series of mental institutions beginning at age thirteen, had escaped from the mental institutions on numerous occasions, was mentally ill, had a personality disorder with schizoid or paranoid features, had been rejected by his mother who was also mentally ill, and had problems starting as early as age seven. Alvord v. State, 694 So.2d 704 n.1 (Fla 1997)

statutory mitigation, the Florida Supreme Court did not err in finding that any failure of the sentencer to consider as nonstatutory mitigating evidence Alvord's capacity for rehabilitation, the history of mental illness within his family and his life experiences while involuntarily committed to mental institutions was harmless.

C. Arbitrary and Capricious Claim

Petitioner's second claim also concerns the Florida Supreme Court's resolution of the Hitchcock claim. Alvord maintains that the Florida Supreme Court made its determinations arbitrarily and capriciously, in violation of the Due Process Clause of the Fourteenth Amendment, in light of its contrary holding in "similar cases," e.g. Hall v. State, 541 So. 2d 1125 (Fla. 1989); Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). Respondent would submit that those cases Alvord maintains were "similar" are readily distinguishable and, indeed, Hall was distinguished by the Florida Supreme Court upon denial of the instant claim.

In Hall v. Dugger, 531 So. 2d 76 (Fla. 1988)(Hall VI), the Florida Supreme Court, upon review of Hall's Petition for

Writ of Habeas Corpus raising a Hitchcock claim, held that Hall's sentencing jury was improperly instructed but, the error was harmless beyond a reasonable doubt. Subsequently, Hall raised this same claim in a motion for post conviction relief in the trial court. Upon review of the denial of the motion, the court (Hall VII) held that its prior ruling on the Hitchcock claim did not preclude Rule 3.850 review because the motion involved *significant* additional non-record facts which were not considered in the habeas proceeding and because Hitchcock was a significant change in the law. Id. at 1126.

Thus, Hall, unlike Alvord was able to overcome the procedural bar by make the showing required by Rule 3.850(f):

> (f) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Furthermore, contrary to Alvord's suggestion, the Florida Supreme Court has limited Hall to such extraordinary circumstances. For example, in Clark v. Dugger, 559 So. 2d 192

(Fla. 1990), Clark asserted the Hitchcock claim in his petition for writ of habeas corpus to the court. In rejecting that claim, the court noted that the claim was procedurally barred because both the state courts and the federal courts had considered Clark's sentencing in light of Hitchcock. The Florida Supreme Court further noted that its decision in Hall VII was not such a change in the law as to require retroactive application and preclude imposition of the procedural bar. Clark at 194.

Under any circumstances the defendant has the burden to establish that an evidentiary hearing is warranted. Under Florida law, a motion for post conviction relief should be denied without an evidentiary hearing when the motion and the record conclusively demonstrates that the movant is entitled to no relief. See Agan v. State, 503 So. 2d 1254 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984). In contrast to Hall, Alvord has not presented substantial nonstatutory mitigating evidence that was withheld from the jury or that was not previously considered by the court when it rejected Alvord's prior Hitchcock claim. Accordingly, the Florida courts' rejection of Alvord's request for an evidentiary hearing does not constitute

a denial of due process, but, rather, is an appropriate application of state procedural laws.

As for the court's resolution of Meeks v. Dugger, as has already been noted in subsection B, Meeks is distinguishable from the instant case because Meeks alleged factual disputes that could only be resolved by an evidentiary hearing. Specifically, the court stated:

> Because of the erroneous jury instruction, the state concedes that the record establishes a Hitchcock violation but maintains the error is harmless. It argues that the record establishes "beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and nonstatutory mitigating factors, the judge would have properly imposed death, regardless of a life recommendation." Demps, 514 So.2d at 1094. We might accept this proposition if we look only at the face of the record. However, according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction. These affidavits assert that substantial nonstatutory mitigating evidence could have been presented, including the fact that Meeks had been a patient in a state mental hospital, that he had received subsequent treatment with psychotropic medication, that he had a history of drug and alcohol abuse, and that he suffered from severe emotional problems as a result of his deprived childhood. On their face, the contents of these affidavits are sufficient to negate the conclusion that the Hitchcock error was harmless. The

> merits of the claims can only be determined by an evidentiary hearing.
>
> Pursuant to our decision in Hall v. State, 541 So.2d 1125 (Fla.1989), Hitchcock claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in Hall. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the Hitchcock allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850. The issue to be decided will be whether the Hitchcock error was harmless. In the event the court decides that the error was not harmless beyond a reasonable doubt, the sentences of death should be set aside and new sentencing proceedings conducted before separate juries.

Id. at 716

In contrast, Alvord specifically asserted that no such hearing was necessary. Furthermore, unlike Alvord, at the time Meeks sought review in the Florida Supreme Court, he had not already had the issue resolved on the merits and was attempting to present the claim once again in a successive and procedurally barred motion for post conviction relief.

The decision of the Florida Supreme Court in the instant case was not arbitrary and capricious. There has never been any question that the triple homicide Alvord committed made him

death eligible. As to the particular mitigating evidence that he has proposed the courts have considered the evidence in light of the facts of this case and found it to be harmless. The harmless error finding goes to the selection phase of the sentencing proceeding and is based on the particular facts of this case. This Court has repeatedly declined to review cases to resolve factual disputes and has held that such review is not appropriate.

The appropriate inquiry when a petitioner asserts that the imposition of a death sentence is arbitrary and capricious is not to engage in a case by case comparison of the facts in every reported appellate decision. Rather, this Court has held that the appropriate inquiry is to consider state court formulations to ensure that they are consistent, but not to review state court cases to determine whether they have been applied consistently. Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188, 201 - 202 (1993).

For example, in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, ___ L.Ed.2d ___ (1997), this Court recently rejected an argument that Angelone's trial court violated his Eighth and Fourteenth Amendment right to be free from arbitrary

and capricious imposition of the death penalty when it failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutorily defined mitigating factors. This Court explained:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id., at 971, 114 S.Ct., at 2634. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. Id., at 972, 114 S.Ct., at 2634- 2635. Petitioner concedes that it is only the selection phase that is at stake in his case. He argues, however, that our decisions indicate that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled. See, e.g., Gregg v. Georgia, 428 U.S. 153, 206-207, 96 S.Ct. 2909, 2940-2941, 49 L.Ed.2d 859 (1976). He further argues that the Eighth Amendment therefore requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.
>
> No such rule has ever been adopted by this Court. While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those

two aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. Tuilaepa, supra, at 971-973, 114 S.Ct., at 2634-2636; Romano v. Oklahoma, 512 U.S. 1, 6-7, 114 S.Ct. 2004, 2008-2009, 129 L.Ed.2d 1 (1994); McCleskey v. Kemp, 481 U.S. 279, 304-306, 107 S.Ct. 1756, 1773- 1775, 95 L.Ed.2d 262 (1987); Stephens, supra, at 878-879, 103 S.Ct., at 2743-2744.

In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 317-318, 109 S.Ct. 2934, 2946-2947, 106 L.Ed.2d 256 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-114, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Johnson v. Texas, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993); Penry, supra, at 326, 109 S.Ct., at 2951; Franklin v. Lynaugh, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in Boyde v. California, 494 U.S. 370, 110 S.Ct.

1190, 108 L.Ed.2d 316 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id., at 380, 110 S.Ct., at 1198; see also Johnson, supra, at 367-368, 113 S.Ct., at 2669.

But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible. See Tuilaepa, supra, at 978-979, 114 S.Ct., at 2638-2639 (noting that at the selection phase, the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); Stephens, supra, at 875, 103 S.Ct., at 2741-2742 (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional, and noting that accepting that argument would require the Court to overrule Gregg, supra).

The jury instruction here did not violate these constitutional principles. The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the

> evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved. Moreover, in contrast to the Texas special issues scheme in question in Penry, supra, at 326, 109 S.Ct., at 2951, the instructions here did not constrain the manner in which the jury was able to give effect to mitigation.
>
> Id. at 761-62

See, also, California v. Ramos, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983) wherein this Court noted, "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Id. at 1008

Alvord was clearly death eligible. The resolution of his Hitchcock claim rests on the particular facts of his case and is not the result of an arbitrary and capricious imposition of the death penalty. As petitioner has failed to show anything more than the appropriate application of prior state precedent and state

procedural rules *to the particular facts of his case*, certiorari review is not warranted.

D. Denial of the Writ

In order for a state court decision to be subject to certiorari review by this Court on the ground that a "federal question" is involved, a petitioner must demonstrate that such a question is "real and substantial." Martin v. Walton, 368 U.S. 25 (1961); Wilner v. Character Committee, 373 U.S. 96 (1963). It is also necessary that a decision thereof would be essential to disposition of the issues presented in the case. Durley v. Mayo, 351 U.S. 277 (1956). This Honorable Court has generally declined to accept jurisdiction of a case from state court on grounds of a "federal question." Mental Hygiene Department v. Kirchner, 380 U.S. 194 (1965); Sanks v. Georgia, 401 U.S. 144 (1970). Certiorari should also be denied where review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. This Court does not grant a certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); See Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.). The absence of a

legal controversy of importance or of a direct conflict as to the legal issues will dictate a denial of certiorari in a case which merely the facts are in dispute. This Court has been "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

In the instant application for writ of certiorari, petitioner has not presented a "real and substantial federal question" for review which is dispositive of the cause or of great public importance. Rather, the court's finding that the Hitchcock claim was properly denied because it had previously been denied on the merits and, therefore, was procedurally barred, turns upon the facts of this particular case and was denied based upon state substantive and procedural law.[3] This finding is not violative of

---

[3] It is the state's position that no viable claim concerning "unconstitutional aggravating factors" has been raised in the instant petition, just as no Espinosa v. Florida, 505 U.S. 1079 (1992) claim was fairly presented to state courts. (See, pg. 20, fn 3, of the instant petition.) Under Florida law this claim is barred as it was not raised at trial nor on direct appeal. See, Order Denying Second Motion for Post Conviction Relief. (C 1-C 2) Accord, Beltran-Lopez v. State, 626 So. 2d 163, 164 (Fla.), cert. denied, __ U.S. ___, 114 S.Ct. 2122, 128 L.Ed.2d 678 (1995); Henderson v. Dugger, 617 So. 2d 313 (Fla.), cert. denied, 507 U.S. 1047, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). See, also, Sochor v. Florida, 504

any constitutional right, does not conflict with any prior precedent of this Court, and is not of great public importance as it turns solely on the facts of this case. Accordingly, the Petition for Writ of Certiorari should be denied.

U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

CONCLUSION

As petitioner has failed to show a denial of any constitutional right or conflict with any prior precedent of this Court, the petition should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar I.D. No.: 0445071
2002 North Lois Avenue, Ste 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

INDEX TO APPENDIX

A 1 - A 13	Alvord v. State of Florida, 694 So. 2d 704 (Fla. 1997)
B 1	May 28, 1997, Florida Supreme Court Order denying Motion for Rehearing filed by Appellant, Case No. 86,837.
C 1 - C 2	September 28, 1995, Thirteenth Judicial Circuit Court Order Denying Defendant's Second Motion for Post Conviction Relief.
D 1 - D 15	Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989)
E 1	Alvord v. Dugger, 494 U.S. 1090 (1990)

Gary Eldon ALVORD, Appellant,
v.
STATE of Florida, Appellee.

No. 86837.1

Supreme Court of Florida.

April 10, 1997.

Rehearing Denied May 28, 1997.

PER CURIAM.

We have for review the trial court's order summarily denying Gary Eldon Alvord's Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. In his motion, Alvord contended that the judge and jury were improperly prevented from considering evidence in mitigation. We have jurisdiction. Art. V, s 3(b)(1), (7), Fla. Const. For the reasons expressed, we affirm the trial court's order.

In 1974, Alvord was convicted and sentenced to death for three counts of first-degree murder. The facts at trial reflected that he broke into and burglarized a home and killed three women who were in the home. The facts of those murders are set forth in detail in Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49

L.Ed.2d 1226 (1976) (Alvord I).

This case has a long history, which is outlined below to properly reflect the procedural posture of the appeal at issue. In 1978, Alvord filed his initial rule 3.850 motion, the denial of which was affirmed by this Court in Alvord v. State, 396 So.2d 184 (Fla.1981) (Alvord II). Thereafter, he filed a habeas petition in federal district court, which was granted. Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla.1983) (Alvord III). That decision was reversed by the Eleventh Circuit Court of Appeals. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.) (Alvord IV), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). Subsequently, the Governor ordered a competency evaluation pursuant to section 922.07, Florida Statutes (1983). Alvord then filed a petition with this Court seeking to be evaluated separate from the procedures set forth in that statute. That petition was denied. Alvord v. State, 459 So.2d 316 (Fla.1984) (Alvord V). After our decision in Alvord V, Alvord was found to be incompetent by psychiatrists appointed by the Governor. The Governor then ordered that a future mental examination be conducted on

September 29, 1987.

On April 22, 1987, the United States Supreme Court issued Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), holding that it is error for a judge to refuse to consider nonstatutory mitigating circumstances and to instruct a jury not to consider such evidence. Prior to the Hitchcock decision, Florida juries and judges had generally considered only statutory mitigating circumstances in death penalty proceedings. Post Hitchcock, this Court acknowledged that the United States Supreme Court's decision constituted a substantial change in the law, which meant that a Hitchcock error could be raised for the first time in a postconviction relief proceeding even if otherwise procedurally barred. Thompson v. Dugger, 515 So.2d 173 (Fla.1987), cert. denied, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); Demps v. Dugger, 514 So.2d 1092 (Fla.1987).

On September 24, 1987, Alvord filed a petition for writ of habeas corpus with this Court seeking a stay of the second mental examination ordered by the Governor, asserting Hitchcock error. On February 9, 1989, this Court denied relief.

Alvord v. Dugger, 541 So.2d 598 (Fla.1989) (Alvord VI), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). In Alvord VI, this Court acknowledged that Hitchcock error had occurred, but found that error to be harmless.

One month after our decision in Alvord VI, this Court issued Hall v. State, 541 So.2d 1125 (Fla.1989), in which we stated that, to allow for an evidentiary hearing, a Hitchcock claim should be presented to the trial court as a rule 3.850 proceeding rather than as a habeas corpus petition. Thereafter, Alvord filed this rule 3.850 proceeding pursuant to Hall, again seeking relief under Hitchcock. In 1992, the trial court entered an order granting an evidentiary hearing to allow Alvord to present nonstatutory mitigating evidence. Before an evidentiary hearing was held on this issue, Alvord amended his motion to include an additional claim unrelated to this appeal. After considering the amended motion and argument of counsel, the trial court reversed its earlier ruling by denying an evidentiary hearing and finding the Hitchcock claim to be procedurally barred. It is this final ruling that is the subject of this appeal.

Alvord contends that the trial judge erred in denying his rule 3.850 motion without holding an evidentiary hearing. He asserts that the procedural posture of this case is the same as that at issue in Hall and that an evidentiary hearing is necessary to allow him to present nonrecord, nonstatutory evidence that has never been considered by any court. Further, he argues that this Court's decision in Alvord VI, in which we found the Hitchcock error to be harmless, does not preclude consideration of the instant claim because in that case we only considered evidence that was on the record. We disagree with these contentions because we find that the nonrecord, nonstatutory evidence Alvord has outlined in the motion at issue is very similar to that which we considered in his previously rejected habeas corpus petition.

In the habeas corpus petition we addressed in Alvord VI, Alvord contended that he was denied the opportunity to present nonstatutory mitigating evidence concerning, among other things, his capacity for rehabilitation; the history of mental illness within his family; his traumatic life experiences while involuntarily committed to mental institutions; and the

fact he was a patient in mental institutions for twelve of the fourteen years preceding the murders in issue while undergoing treatment as a paranoid schizophrenic. In finding the Hitchcock error to be harmless, we first reiterated the statutory aggravating and mitigating circumstances that were properly considered at the penalty phase proceeding and found to exist by the trial judge. Specifically, the trial judge found three aggravating circumstances (committed during the course of a felony, each of the murders was heinous, atrocious, or cruel, and great risk of bodily harm to more than one person), and two mitigating circumstances (at the time of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired). We also noted that much of the evidence in mitigation outlined in the habeas corpus petition had been presented to the judge and jury.[1] Finally, we

---

[1]During the penalty phase proceeding, one witness was called to testify, Dr. Ames Robey. Although Dr. Robey was called to testify on behalf of the State, he testified to factors in both aggravation and mitigation. As to statutory mitigation, Dr. Robey testified that Alvord was under extreme stress at the time he committed the murders and that his capacity to conform his conduct to the requirements of the law was impaired. On cross-examination by defense counsel, Dr. Robey was also allowed to testify that Alvord was confined

concluded that the additional evidence in mitigation set forth in the petition was "clearly insufficient to change the sentencing decision, given the circumstances in this case." Alvord VI, 541 So.2d at 600.

In his latest petition, Alvord argues that the judge and jury should have been allowed to consider that he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent. This asserted evidence in mitigation is comparable to that which we considered in Alvord VI. Further, much of this evidence is similar to that presented during the penalty phase proceeding or was specifically not presented at trial based on Alvord's refusal to be examined by

---

to a series of mental institutions beginning at age thirteen, had escaped from the mental institutions on numerous occasions, was mentally ill, had a personality disorder with schizoid or paranoid features, had been rejected by his mother who was also mentally ill, and had problems starting as early as age seven.

court-appointed psychiatrists.[2] Given that we previously found the Hitchcock error to be harmless based on very similar evidence, we must again reject Alvord's request for a new penalty phase proceeding. Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion. This is especially true given that much of the evidence in mitigation goes to Alvord's mental condition, which was specifically found to be a factor in mitigation. Moreover, we do not find that our decision in Hall mandates a contrary conclusion.

We did conclude in Hall that a previous finding of harmless error on a Hitchcock claim raised under a habeas corpus petition did not bar a subsequent review of a Hitchcock claim under a rule 3.850 motion. In so finding, however, we stated that the trial court's express orders in Hall's trial

---

[2]In Alvord II, we addressed the issue of whether Alvord's counsel was ineffective for failing to claim insanity as a defense. We rejected that contention, finding that the record was replete with various pre-trial motions filed by defense counsel on this issue but that defense counsel had been precluded from presenting any evidence of insanity because Alvord had refused to communicate in any manner with the two psychiatrists appointed for that purpose.

effectively precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances. We additionally concluded that Hall had raised "significant additional nonrecord facts" that were not considered in his habeas corpus proceeding. For instance, in his habeas petition, Hall contended that, had the following nonstatutory evidence been considered, he would have received life: (1) he was not the shooter; (2) he attempted to dissuade his accomplice from beating and killing the victim; (3) he took police to the body; (4) he had used alcohol and drugs; (5) he offered no resistance when arrested; and (6) the evidence against him was weak. We rejected this claim, finding that this evidence was presented to the jury and judge through Hall's testimony; that the evidence was speculative at best; and, when balanced against the evidence in aggravation, that Hall's sentence would have been no different. In his subsequent rule 3.850 motion, Hall claimed that the Hitchcock error prevented his attorney from investigating and discovering evidence in mitigation that would have shown that he suffered from an extreme mental and emotional disturbance, suffered

from organic brain dysfunction, and was illiterate. Unlike the situation at issue, the evidence raised in Hall's rule 3.850 motion was substantially different from that raised in the habeas petition and it was this substantially different evidence that we found warranted a new penalty phase proceeding.

In conclusion, because we find that the evidence outlined in Alvord's rule 3.850 motion is not substantially different from that which we considered and rejected as warranting a new penalty proceeding in Alvord VI, we find that the trial court properly denied his motion.

Accordingly, we affirm the trial court's order summarily denying Alvord's rule 3.850 motion.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J., concurs.

ANSTEAD, Justice, dissenting.

There is no credible basis for distinguishing this case from our holding in Hall v. State, 541 So.2d 1125 (Fla.1989), in which we decided as a matter of policy that Hitchcock claims should be presented under rule 3.850 rather than as habeas corpus petitions to this Court. Importantly, we acknowledged that "[a]ppellate courts are reviewing, not fact-finding, courts." 541 So.2d at 1128. Further, we specifically rejected the trial court's conclusion that our earlier denial of a habeas corpus petition based upon the same grounds barred rule 3.850 relief for Hall:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI, constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. Cooper v. Dugger, 526 So.2d 900 (Fla.1988); Thompson v. Dugger, 515 So.2d 173 (Fla.1987), cert. denied, 485 U.S. 960, 108 S .Ct. 1224, 99 L.Ed.2d 424 (1988); McCrae v. State, 510 So.2d 874 (Fla.1987); Downs v.

Dugger, 514 So.2d 1069 (Fla.1987).

541 So.2d at 1126. It is interesting to note that the vote in Hall was four to three with the three justices in dissent all expressing the view that no evidentiary hearing was necessary because even taking the proffered mitigation evidence as true, they did not believe it would change the outcome, i.e., the imposition of the death penalty. The position of the dissenters in Hall is remarkably similar to the majority's conclusion here that, "Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion." Majority opinion at 706.

We should apply the analysis and holding of the majority in Hall, and not the analysis and holding of the dissenting justices. In failing to do so, we have erred in substituting our opinion for that of a jury who no one can deny should have been allowed to hear the defendant's mitigating evidence. As noted by all of the opinions in this case, we are dealing with a defendant who has a lengthy and undisputed history of serious mental illness, who has even been found

incompetent by a team of State experts appointed by the Governor, contrary to the opinion of Dr. Robey, the State's trial expert whose testimony is extensively relied on in the majority opinion. Under circumstances arguably less compelling, we afforded Hall the benefit of an evidentiary hearing before a trial court. There is no reasonable basis for treating Alvord differently.

KOGAN, C.J., concurs.

SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 28, 1997

GARY ELDON ALVORD,	*	
	*	
Appellant,	*	
	*	CASE NO. 86,837
v.	*	
	*	Circuit Court No. 73-1398
STATE OF FLORIDA,	*	(Hillsborough)
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * *	*	

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur

KOGAN, C.J. and ANSTEAD, J., dissents

TC
cc: Hon. Richard L. Ake, Clerk
Hon. Diana M. Allen, Judge
Mr. William J. Sheppard
Mr. Adam B. Allen
Ms. Elizabeth L. White
Mr. D. Gray Thomas
Ms. Candance Sabella

Sid J. White
Clerk, Supreme Court

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

CASE NO. 73-1398

vs.

DIVISION "C"

GARY ELDON ALVORD,

_____/

ORDER DENYING DEFENDANT'S SECOND
MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon Defendant's Second Motion for Post Conviction Relief, as Amended, filed through counsel, and the Court having considered the Motion, the Response to Defendant's Second Amendment to Second Motion for Post Conviction Relief filed by the Office of the Attorney General, oral argument by counsel, and having once granted an evidentiary hearing and said hearing never having occurred due to continuance granted for good cause, the Court sua sponte ordered a rehearing for oral argument and having heard oral argument by counsel on July 19, 1995, the Court now finds that the issues raised by the Defendant for relief pursuant to Hitchcock v. Dugger, 481 U.S.

393 (1987) and Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 852 (1992), are procedurally barred, and it is hereby,

ORDERED AND ADJUDGED that the Motion as amended is DENIED.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO APPEAL.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 28th day of September, 1995.

/S/
DIANA M. ALLEN
CIRCUIT JUDGE

Copies furnished to:

State Attorney's Office - Division C
Office of the Attorney General
William J. Sheppard, Esquire, for Defendant

Gary Eldon ALVORD, Petitioner,
v.
Richard L. DUGGER, etc., et al., Respondents.

No. 71192.

541 So.2d 598, 14 Fla. L. Week. 248

Supreme Court of Florida.

Feb. 9, 1989.

Rehearing Denied May 11, 1989.

PER CURIAM.

Gary Eldon Alvord petitions this Court for a writ of habeas corpus and seeks a vacation of his death sentence and a new trial or, in the alternative, a new sentencing proceeding. We have jurisdiction. Art. V, Sec. 3(b)(1), (9), Fla. Const. We deny relief.

The evidence at trial demonstrated that Alvord entered and burglarized the house of Ann Herrmann. During the burglary, he committed three murders by using a piece of cord and strangling Ann, her mother, Georgia Tully, and her daughter, Lynn Herrmann. Further, a vaginal test on Lynn revealed semen. On April 9, 1974, the jury convicted Alvord of three counts of first-degree murder. The jury recommended

the death penalty, and the trial judge imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So.2d 533 (Fla.1975) [Alvord I], cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

On November 29, 1976, Alvord filed a motion, pursuant to Florida Rule of Criminal Procedure 3.800, seeking a reduction in his sentence. The trial court denied the motion, and, on review, this Court denied his petition for a writ of mandamus in an unreported order on March 10, 1977 [Alvord II].

On October 6, 1978, Alvord filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion and this Court affirmed that decision. Alvord v. State, 396 So.2d 184 (Fla.1981) [Alvord III]. Alvord then sought relief in federal court by filing a petition for a writ of habeas corpus. Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla.1983). After the district court granted part of the petition with respect to the penalty phase, id. at 490-91, the Eleventh Circuit Court of Appeals reversed and held that both the conviction and the

sentence should be affirmed. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). The failure to allow nonstatutory mitigating circumstances was addressed and rejected in that federal court proceeding. Id. at 1299.

On November 20, 1984, Alvord petitioned this Court for a writ of extraordinary relief and requested a judicial determination of his competency to be executed separate from the existing procedure under section 922.07, Florida Statutes (1983). This Court denied that petition in Alvord v. State, 459 So.2d 316 (Fla.1984) [Alvord IV].

Alvord initially presented the instant habeas corpus petition before this Court seeking (1) a stay of the mental examination directed by the governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase, in violation of the rule set forth by the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We denied the

requested stay of the mental examination in an unreported order. Subsequently, Alvord filed an amended habeas corpus petition, adding the ground that we erred in affirming the trial court's admission of his statements when no proper warning of his right to counsel as an indigent was given. Here, he argues that since we subsequently recognized this specific error in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), and expressly receded from our earlier holding in Alvord I, we should now rectify this error and grant a new trial. We granted oral argument on the Hitchcock and confession claims.

Hitchcock Claim

[1] In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants--the prosecutor, the defense counsel, and the trial judge--explained to the jury

that it should limit consideration of mitigating circumstances to those enumerated in the statutes.

We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, --- U.S. ----, 108 S.Ct. 2834, 100 L.Ed.2d 935 (1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 531 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Fla.1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert. filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikenas v. Dugger, 519 So.2d 601

(Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, --- U.S. ----, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental

institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Confession Error

[2] The record establishes that the trial court admitted Alvord's statements despite the investigating detective's improper Miranda warnings. Following the arrest, the detective read Alvord his rights but failed to explain that he had a right to appointed counsel if indigent. In Alvord I, we held that this failure to give the correct Miranda warnings did not preclude the evidence from being admitted. Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). However, in Caso v. State, we receded from that holding in Alvord and stated: "We therefore recede from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant." 524 So.2d at 425.

Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless. During trial, the state presented testimony of numerous witnesses linking Alvord to the three murders. The principal part of the state's case was not Alvord's custodial statements but the testimony of his girlfriend, Zelma Hurley. She recounted a conversation she had with Alvord the morning following the murders. She testified that Alvord told her that he went over to Ann's house the previous night to "rub out" the victims; he entered the house after kicking the door in; he placed Ann, Lynn, and Georgia in separate rooms and strangled them; he did not want to strangle the older woman but did so to avoid witnesses; and he left the home with money. The importance of her testimony was reflected in Alvord's brief on direct appeal where he stated: "The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony." Appellant's Opening Brief at 9, Alvord v. State, 322 So.2d 533 (Fla.1975). In that brief, Alvord also stated:

The evidence tending to connect the Defendant with the murders consisted of the following:

First. While the State maintained that the murders were committed during the course of a burglary of Ann Herrmann's home, the State also offered evidence tending to show that the Defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the Defendant had stated to her quite a few times that he disliked Ann Herrmann, and Jeanine Brautigan testified that about a month before the murders were committed the Defendant told her he could or would choke Ann Herrmann.

Second. The State introduced evidence tending to show that the Defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 1 ½" to 2" high. George Valahakis, Ann Herrmann's ex-husband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond, and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color , with diamonds on each side of the watch where the band joined the watch. The band was also white-gold in color and it was an expandable type band.

The watch, the rings, and the lighter

> were never recovered and were not introduced in evidence at the trial. The State did, however, present testimony that the Defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the Defendant had a gold and purple cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed. Terri Williams who had seen the Defendant in Detroit, Michigan on June 25, 1973, testified that the Defendant had in his possession at that time a small woman's diamond watch with a stretch band.
>
> Third. The State introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the defendant and Zelma Hurley.
>
> The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women, and a shirt which Zelma Hurley stated belonged to the Defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.

Id. at 7-9. We find that these circumstances distinguish the instant case from Caso because in Caso the inadmissible testimony was the only real evidence linking the defendant to

the murder. In this instance, Alvord's statements were clearly not the focus of this trial but were cumulative to the primary evidence presented by his girlfriend. In our view, the admission of the statements constituted harmless error.

After examining the record carefully, we find that there is no reasonable possibility that the Hitchcock error or the erroneously-admitted testimony contributed to the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). Consequently, the errors, both individually and collectively, were harmless. For the foregoing reasons, we deny relief and the stay entered in this case is vacated.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD and SHAW, JJ., concur.

GRIMES, J., concurs with an opinion, in which EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, J., dissents with an opinion, in which BARKETT, J., concurs.

GRIMES, Justice, concurring.

While I agree that the admission of Alvord's statements can be considered as harmless error, I also believe that this Court's ruling in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), should not be given retroactive effect even in this case. Caso involved the admissibility of a confession given after a defective Miranda[1] warning. Yet, the United States Supreme Court refused to give the Miranda decision itself retroactive application on the premise that a violation of the Miranda rule was less likely to affect the reliability of a confession than one induced by coercion. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882, reh'g denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121 (1966). Based on this rationale, both Florida, Nowlin v. State, 346 So.2d 1020 (Fla.1977), and the United States Supreme Court, Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), permit confessions obtained without proper Miranda warnings to be admitted for purposes of impeachment as long as the confessions are

---

[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

voluntary. Therefore, it is clear that the admission of Alvord's statements could not be deemed fundamental error.

In Alvord I, this Court interpreted Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), as authority to hold that Alvord's statements could be admitted even though his Miranda warnings failed to include the advice that an attorney would be appointed to represent him if he were indigent. As a result of the United States Supreme Court's more recent interpretation of Michigan v. Tucker in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), we found it necessary to recede from that position. However, the point was squarely decided against Alvord in Alvord I and only changed after a later Supreme Court decision demonstrated that we had previously misinterpreted Michigan v. Tucker. As related to any other defendant, this would constitute an evolutionary change in the law within the contemplation of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), and I do not think that the principle is any different simply because it is Alvord who now complains.

EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, Justice, dissenting.

I cannot agree that the admission of petitioner's statements in violation of Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), is harmless error. The state's case against petitioner rested primarily, and almost exclusively, upon the testimony of Zelma Hurley. Petitioner's statements to the police in Michigan corroborated and gave credibility to the testimony of Ms. Hurley. The state in its closing argument to the jury put great emphasis on this statement and its importance in explaining its theory of the case. This error certainly cannot be classified as harmless.

I also cannot agree that the jury's inability to consider certain nonstatutory mitigating circumstances, such as petitioner having been a patient in mental institutions for twelve of the fourteen years preceding the commission of this crime while undergoing treatment as a paranoid schizophrenic, can be said to be harmless error beyond and to the exclusion of every reasonable doubt. The jury may have returned a

recommendation of life imprisonment had it been permitted to consider this evidence and the trial judge in sentencing the petitioner might have been required to follow this recommendation under Tedder v. State, 322 So.2d 908 (Fla.1975), because the recommendation would have been reasonable.

I would grant the petition and vacate the petitioner's conviction and sentence and remand for the purpose of conducting a new trial as to both guilt and penalty.

BARKETT, J., concurs.

Gary Eldon ALVORD, petitioner,
v.
Richard L. DUGGER, Secretary, Florida Department of Corrections

No. 89-5331

Supreme Court of the United States

April 16, 1990

Petition for writ of certiorari to the Supreme Court of Florida.

Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.